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Bernard Schwartz

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National League of Cities Again - R.I.P. or a Ghost that Still Walks?

Cover Page Footnote

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NATIONAL LEAGUE OF CITIES AGAIN—R.I.P. OR A GHOST THAT STILL WALKS?

BERNARD SCHWARTZ*

INTRODUCTION

“WHO is there who has not felt a sudden startled pang at reliving an old experience or feeling an old emotion? ‘*I have done this before. . .*’”¹ A legal commentator all too often has the same feeling of *deja vu*. This is the third article I have written on *National League of Cities v. Usery*.² The first analyzed the case’s possible impact not long after the Supreme Court decision was rendered.³ The second, a 1983 assessment of the post-*National League of Cities* jurisprudence, was triggered primarily by the decision earlier that year in *EEOC v. Wyoming*.⁴ This third article is prompted by *Garcia v. San Antonio Metropolitan Transit Authority*,⁵ in which the Court flatly overruled *National League of Cities*.

My natural reluctance to write once again on the same subject is outweighed by the importance of the *Garcia* decision. *National League of Cities* appeared to be a constitutional landmark which drastically altered the relationship between federal and state power.⁶ Its overruling is an event of equal significance, the implications of which deserve at least as much comment as *National League of Cities* itself.

This Article contains five principal sections. Part I discusses the decision in *National League of Cities*. Part II analyzes the cases applying *National League of Cities*. The *Garcia* decision will be examined in Part III and critiqued in Part IV. Finally, Part V concludes that the *Garcia* Court’s abdication of judicial review should be repudiated.

I. NATIONAL LEAGUE OF CITIES V. USERY

The natural starting point for any discussion of the *Garcia* decision and its impact is the case it overruled. At issue in *National League of*

* Edwin D. Webb Professor of Law, New York University School of Law. The author acknowledges the generous support of the Filomen D’Agostino and Max E. Greenberg Research Fund of New York University School of Law.

1. Agatha Christie, *Curtain* 1 (1975) (emphasis in original).

2. 426 U.S. 833 (1976).

3. See Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 *Fordham L. Rev.* 1115 (1978).

4. 460 U.S. 226 (1983); see Schwartz, *National League of Cities v. Usery Revisited—Is the Quondam Constitutional Mountain Turning Out to Be Only a Judicial Molehill?*, 52 *Fordham L. Rev.* 329 (1983).

5. 105 S. Ct. 1005 (1985).

6. See, e.g., Heldt, *The Tenth Amendment Iceberg*, 30 *Hastings L.J.* 1763, 1764-65 (1979) (*National League of Cities* only “tip of a tenth amendment iceberg”); Percy, *National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well*, 51 *Tul. L. Rev.* 95, 106 (1976) (*National League of Cities* is “momentous” decision).

Cities were the Fair Labor Standards Amendments of 1974.⁷ The amendments broadened the coverage of the original 1938 Act⁸ by extending it to the states, thus making federal minimum wage and hour requirements applicable to state and local government employees.⁹ The Court ruled the extension invalid, holding that Congress could not impose on the states wage and hour requirements previously imposed on private employers.¹⁰ The fact that the commerce power clearly covered employment conditions of comparable private employees was not determinative.¹¹ The Court sharply distinguished federal regulation of private employment from federal regulation of public employment¹² and noted that decisions establishing the breadth of congressional authority under the commerce clause had involved laws regulating private individuals and businesses.¹³ A different situation exists when Congress seeks to exercise the commerce power in a manner infringing on the states' existence as essential elements of the federal system: "[T]here are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution."¹⁴

Under *National League of Cities*, congressional authority under the commerce clause does not include regulation "directed . . . to the States as States."¹⁵ The states are immune from federal control in the performance of their governmental activities.¹⁶ The challenged provision violated this immunity by directly supplanting the choices of the states on their employment policies.¹⁷ Congress may not exercise its commerce clause authority so as to impair the states' ability to function effectively as separate and independent entities—a concept that is implicit in the federal system embodied in the Constitution.¹⁸

7. Pub. L. No. 93-259, 88 Stat. 55 (codified as amended at 29 U.S.C. §§ 201-219 (1982)).

8. The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-219 (1982), amended by Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 1985 U.S. Code Cong. & Ad. News (99 Stat.) 787).

9. The definition of employer in the Act was broadened to include a "public agency." See 29 U.S.C. § 203(d) (1982). A public agency was defined as

the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

Id. § 203(x).

10. See *National League of Cities*, 426 U.S. at 852.

11. See *id.* at 837, 840-41.

12. See *id.* at 840-41, 845.

13. *Id.* at 840-41.

14. *Id.* at 842.

15. *Id.* at 845.

16. As the Court noted, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . . because the Constitution prohibits it from exercising the authority in that manner." *Id.*

17. *Id.* at 845-52.

18. *Id.* at 852.

To comprehend the impact of *National League of Cities*, one must understand the manner in which the Supreme Court had exercised its role as arbiter of federalism in the years before that decision. The Court's role in this respect is, of course, one that it has exercised from the beginning of our constitutional system.¹⁹ At the same time, it can hardly be gainsaid that the manner in which that role has been performed has been drastically altered in recent years. "It is," in the words of Justice Jackson, "undeniable that . . . we have been in a cycle of rapid centralization, and Court opinions have sanctioned a considerable concentration of power in the Federal Government with a corresponding diminution in the authority and prestige of state governments."²⁰ In the first part of our history, the Supreme Court attempted to maintain an equal poise between federal and state authority;²¹ more recently, it has tended to place ever-increasing weight on the federal side of the balance.²² Federal authority can be exerted today even in areas that were formerly perceived as purely within the competence of the states.²³ Few, if any, activities are now deemed so local as to be beyond the expanded reach which the Court has given to congressional commerce power: "If it is interstate commerce that feels the pinch," declared the Court colloquially in 1949, "it does not matter how local the operation which applies the squeeze."²⁴

Prior to *National League of Cities*, the Supreme Court had all but overturned previous limitations on the exercise of federal authority,²⁵

19. See B. Schwartz, *American Constitutional Law* 10-11 (1955); see generally R. Moschizker, *Judicial Review of Legislation* (1971) (system of judicial review intended by those who wrote and adopted the Constitution).

20. R. Jackson, *The Supreme Court in the American System of Government* 65-66 (1955) [hereinafter cited as Jackson I].

21. This balance has often been termed "dual sovereignty" and has been defined by Professor Corwin:

It is the theory of two mutually exclusive, reciprocally limiting fields of power, the governmental occupants of which confront each other as equals. . . . '[A]s the Constitution itself does not draw the line, the question is necessarily one for judicial decision.'

E. Corwin, *The Commerce Power Versus States Rights* 135 (1936) (quoting Chief Justice Taney); see B. Schwartz, *supra* note 19, at 164-65.

22. See B. Schwartz, *supra* note 19, at 167-70; cf. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 847-48 (1979) ("From 1936 to 1976 Congress determined the allocation of governmental power in the federal system virtually without judicial interference.").

23. See *infra* note 25.

24. *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

25. Even purely intrastate activities are viewed as proper subjects for congressional regulation under the commerce clause, as long as such actions affect interstate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964) (activities of local restaurant affected interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964) (operation of local hotel affected interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 118-19, 127-29 (1942) (quotas on wheat produced solely for consumption on farm valid under commerce clause); *United States v. Darby*, 312 U.S. 100, 113-15 (1941) (goods produced intrastate under substandard labor conditions are subject to regulation under the commerce clause); Schwartz, *supra* note 3, at 1119-20 (effect of local activities on commerce need not be substantial to bring those activities

prompting observers to ask whether the federal system might be replaced by a unitary government in which the states would be reduced to mere appendages.²⁶ If the states still had "something of the magic of Athens and of Rome,"²⁷ perhaps they were also fated to share the ultimate destiny of those once-vital polities, at least in regard to the reality of governmental power.

The *National League of Cities* decision appeared to change this. For the first time since the 1930's, the Court struck down an exercise of congressional power under the commerce clause,²⁸ and it did so on the ground that the federal statute at issue invalidly impinged on the operation of the states as coordinate independent governments. If anything seemed inconsistent with the past four and one half decades of concentration of authority in the federal government, it was the notion that the states retain the attributes of sovereignty. Now the Supreme Court itself relied on "traditional aspects of state sovereignty"²⁹ to invalidate a federal statute. What Justice Brennan termed "the newly announced 'state sovereignty' doctrine of *National League of Cities v. Usery*"³⁰ seemed to signal an entirely new approach to what Woodrow Wilson called the cardinal question of our time—"[t]he question of the relation of the States to the federal government."³¹

II. POST-NATIONAL LEAGUE OF CITIES CASES

In *EEOC v. Wyoming*,³² the Court explained the decision in *National League of Cities*:

National League of Cities was grounded on a concern that the imposition of certain federal regulations on state governments might, if left unchecked, 'allow "the National Government [to] devour the essen-

within the regulatory power of Congress under the commerce clause); *see also* *Fry v. United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.").

26. *See* Heldt, *supra* note 6, at 1764 ("The states have seemed destined to become mere administrators of federal programs and regulations, a convenience of the federal government much as municipal corporations are an administrative convenience of the states.").

27. H. Laski, *The American Democracy* 139 (1948).

28. *See* *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-04, 308-10 (1936). It should be pointed out, however, that in certain situations the Court has adopted a narrow reading of a statute in order to avoid an interpretation that might run afoul of the commerce clause. *See, e.g.,* *Rewis v. United States*, 401 U.S. 808, 811-12 (1971) (Travel Act cannot be used to punish those who run a gambling establishment in Florida); *United States v. Five Gambling Devices*, 346 U.S. 441, 443-45, 451-52 (1953) (statute requiring dealers in gambling devices to register interpreted as requiring some connection to interstate commerce).

29. *National League of Cities*, 426 U.S. at 849.

30. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 822 n.4 (1976) (Brennan, J., dissenting).

31. W. Wilson, *Constitutional Government in the United States* 173 (1911).

32. 460 U.S. 226 (1983).

tials of state sovereignty," It therefore drew from the Tenth Amendment an 'affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution.'³³

National League of Cities was intended to prevent "undue federal interference in certain core state functions."³⁴ "In *National League of Cities* . . . the Court made clear that the State's regulation of its relationship with its employees is an 'undoubted attribute of state sovereignty.' . . . Yet . . . *National League of Cities* acknowledged that not all aspects of a State's sovereign authority are immune from federal control."³⁵ *National League of Cities* did not specify what federal interferences came within its constitutional ban. An attempt to fill this gap was made in the post-*National League of Cities* jurisprudence—at least prior to the *Garcia* case. The Court developed a three-prong test to determine whether a federal regulation directed to the states was valid:

'[T]o succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."'³⁶

The post-*National League of Cities* cases did not deal with the second prong of this test³⁷ and it is not clear precisely what the Court meant by

33. *EEOC*, 460 U.S. at 236 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 841 (1976)) (brackets in original).

34. *Id.*

35. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 764 n.28 (1982).

36. *EEOC*, 460 U.S. at 237 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981)) (emphasis in original); see *Hodel*, 452 U.S. at 287-88.

In *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985), the Court pointed to the existence of a fourth condition: a national interest which overrides competing state interests. See *id.* at 1011; *Hodel*, 452 U.S. at 288 n.29. This final factor requires a balancing test and was drawn from Justice Blackmun's concurrence in *National League of Cities*. "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring). Although mentioned by the Court in several opinions, see, e.g., *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684 n.9 (1982), the balancing factor has not been used, except in dictum in *EEOC v. Wyoming*, 460 U.S. 226 (1983). The Court based its holding in *EEOC* on a failure to satisfy the third prong of *National League of Cities*. See *EEOC*, 460 U.S. at 238-39. It noted, however, that the federal interest in the legislation at issue might require a finding "that the nature of that interest 'justifies state submission.'" *Id.* at 242-43 n.17.

37. In *EEOC v. Wyoming*, 460 U.S. 226 (1983), the Court stated that the second

an "undoubted attribute of state sovereignty." ³⁸ The first and third prongs were, however, the subjects of Supreme Court decisions.

*Hodel v. Virginia Surface Mining & Reclamation Association*³⁹ was the key case interpreting the first prong. The statute at issue in *Hodel* established federal standards for surface mining operations.⁴⁰ This statute did not meet the first prong's requirement because it did not regulate states, but "only the activities of coal mine operators who are private individuals and businesses."⁴¹ The fact that the federal law may have preempted state regulatory laws did not change the result. A federal law displacing state regulation of private businesses does not constitute the required regulation of a state as a state.⁴²

The third prong of the test used in applying *National League of Cities* had two aspects: the federal law must directly impair the states' ability 1) to structure integral operations, 2) in areas of traditional governmental functions.⁴³ *National League of Cities* explained the second aspect by saying that its holding applied to "those governmental services which the States and their political subdivisions have traditionally afforded their citizens."⁴⁴ According to the Court, this requirement was not met in *United Transportation Union v. Long Island Rail Road*.⁴⁵

The Long Island Rail Road was a commuter line owned and operated by New York State, which had acquired it in 1966.⁴⁶ A state law prohibited strikes by public employees,⁴⁷ while a federal law permitted railroad employees to strike after mediation efforts failed to resolve a labor dispute.⁴⁸ After negotiations and mediation efforts failed, the union sued for a declaratory judgment that the labor dispute was governed by the federal law.⁴⁹ That raised the further question of whether the federal law could constitutionally be applied to a state-owned railroad. In such a case, was the federal law an unconstitutional intrusion on state autonomy under *National League of Cities* because it interfered with the state's policy of prohibiting strikes by its employees?

The Supreme Court said no, stating that the key issue was whether the federal law impaired the state's authority with respect to "areas of tradi-

prong had posed "difficulties," *id.* at 237-38, and that cases after *National League of Cities* had done little "to amplify on our understanding of the concept." *Id.* at 238 n.11.

38. *Id.* at 238 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976)).

39. 452 U.S. 264 (1981).

40. *Id.* at 268-72.

41. *Id.* at 288.

42. *Id.* at 289-90.

43. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976); see *EEOC v. Wyoming*, 460 U.S. 226, 237 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

44. *National League of Cities*, 426 U.S. at 855.

45. 455 U.S. 678 (1982).

46. *Id.* at 680.

47. *Id.* at 681.

48. *Id.*

49. *Id.*

tional [state] functions.’”⁵⁰ The Court concluded it did not. In this country, operation of railroads “has traditionally been a function of private industry, not state or local governments.”⁵¹ State control of some railroads in recent years “does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state’s ability to function as a state.”⁵²

In *EEOC v. Wyoming*,⁵³ however, the Court held that the “management of state parks is clearly a traditional state function.”⁵⁴ Despite this, the Court sustained a federal law prohibiting compulsory retirement of state park employees because of age.⁵⁵ The federal statute at issue⁵⁶ prohibited employment discrimination against workers between the ages of forty and seventy “except ‘where age is a bona fide occupational qualification’ ” for the given job.⁵⁷ In 1974, Congress extended the law to the states acting as employers.⁵⁸ Wyoming had a statute permitting the state to retire game wardens at age fifty-five.⁵⁹ The state claimed that the 1974 law violated the principles laid down in *National League of Cities*. The Supreme Court disagreed, upholding the extension of the federal statute to the states.⁶⁰

The Court recognized the management of state parks as a traditional state function.⁶¹ Nevertheless, it held that the third prong of the *National League of Cities* test was not met because the federal law was not one which “directly impairs the States’ ability to structure their integral operations.”⁶² The statute at issue in *National League of Cities* had a drastic financial effect; it forced the states to pay their workers a minimum wage and an overtime rate that would leave less money for other state programs.⁶³ In *EEOC*, there was no such effect. The state could pay its workers exactly what it would have without the federal law.⁶⁴ In addition, the state could still assess the fitness of its game wardens and dismiss those found unfit.⁶⁵ Indeed, the federal law permitted the state to continue its employment practice if it could “demonstrate that age is a

50. *Id.* at 684 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)) (brackets in original).

51. *Id.* at 686.

52. *Id.* (emphasis in original).

53. 460 U.S. 226 (1983).

54. *Id.* at 239.

55. *Id.*

56. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (current version at 29 U.S.C. §§ 621-634 (1982)).

57. 460 U.S. 226, 229 (1983).

58. *Id.*

59. *Id.* at 234 & n.7.

60. *Id.* at 239.

61. *Id.*

62. *Id.*

63. *Id.* at 240; see *National League of Cities v. Usery*, 426 U.S. 833, 846-47 (1976).

64. 460 U.S. at 241.

65. *Id.* at 239.

'bona fide occupational qualification' for the job of game warden."⁶⁶ Hence, the Court concluded, "the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States."⁶⁷

III. *GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

Justice Blackmun begins his majority opinion in *Garcia* by noting: "We revisit in these cases an issue raised in *National League of Cities v. Usery*."⁶⁸ The issue in *Garcia* was the application of the minimum-wage and overtime provisions of the Fair Labor Standards Act to employees of the publicly-owned mass transportation system in San Antonio.⁶⁹ The system had been privately owned and operated until 1959, when it was purchased by the city, which subsequently transferred ownership and operation to appellee public authority.⁷⁰ Appellee had brought the original action, seeking a determination that it was entitled to *National League of Cities* immunity from the federal statute.⁷¹

To one familiar with post-*National League of Cities* jurisprudence, *Garcia* appears to involve only a simple application of the *Long Island Rail Road* decision.⁷² But the district court saw the case differently. It found that the San Antonio Transit Authority was performing a traditional state function and met all requisites for tenth amendment immunity from the minimum wage and overtime provisions of the Fair Labor Standards Act.⁷³ On direct appeal, the Supreme Court remanded for reconsideration in light of the recently-decided *Long Island Rail Road* case.⁷⁴ On remand, the district court again granted judgment to the transit authority: "Upon further consideration, this Court finds nothing in *LIRR* that compels a change in its previous conclusion that operation of a public transit system is a governmental function entitled to Tenth Amendment immunity."⁷⁵

Three federal circuit courts and one state appellate court had reached the opposite conclusion.⁷⁶ Thus, it would have been easy for the Supreme Court simply to hold that *Long Island Rail Road* governed and

66. *Id.* at 240.

67. *Id.* at 239.

68. *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1007 (1985).

69. *Id.* at 1007-08.

70. *Id.* at 1007.

71. *Id.* at 1009.

72. See *supra* notes 45-52 and accompanying text.

73. See *San Antonio Metropolitan Transit Auth. v. Donovan*, 557 F. Supp. 445, 446 (W.D. Tex. 1983) (district court citing its previous summary judgment decision in favor of the transit authority), *rev'd*, 105 S. Ct. 1005 (1985).

74. 457 U.S. 1102 (1982).

75. 557 F. Supp. 445, 446 (W.D. Tex. 1983), *rev'd*, 105 S. Ct. 1005 (1985).

76. See *Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50, 52-53 (6th Cir. 1983); *Alewine v. City Council*, 699 F.2d 1060, 1067-69 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 1391 (1985); *Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308,

that operation of a mass-transit system was not a "traditional governmental function" and hence not exempt under *National League of Cities* from a federal regulatory law.⁷⁷ Instead, the Court by a bare majority delivered a broadside decision overruling *National League of Cities* itself.⁷⁸

The Court's opinion gave two principal reasons for overruling *National League of Cities*: 1) "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is . . . unworkable" and 2) such an attempt is "inconsistent with established principles of federalism."⁷⁹

The conclusion that the "traditional function" test was unworkable was based on an analysis of federal cases that had attempted to apply the test.⁸⁰ Justice Blackmun summarized the cases—both those holding particular functions to be protected under *National League of Cities* and those reaching the opposite result.⁸¹ It was "difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side."⁸² The result was the necessity of "identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it."⁸³

Even more significant was *Garcia*'s rejection of the underlying premise of *National League of Cities*—that the principles of federalism impose restrictions on the commerce clause and hence on the scope of congressional regulatory authority vis-a-vis the states.⁸⁴ *National League of Cities* assumed that there were limits on the federal government's power to interfere with state functions and that the courts had to enforce those limits.⁸⁵ The *Garcia* opinion agreed that "the Constitution's federal structure imposes limitations on the Commerce Clause."⁸⁶ But it refused

309-10 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983); *Francis v. Tallahassee*, 424 So. 2d 61, 62 (Fla. Dist. Ct. App. 1982).

77. *But see Garcia*, 105 S. Ct. at 1032 (Powell, J., dissenting) ("[Municipal operation of an intracity mass transit system] nevertheless is a classic example of the type of service traditionally provided by local government.").

78. *Id.* at 1007.

79. *Id.*

80. *Id.* at 1011.

81. *Id.*

82. *Id.*

83. *Id.* at 1010 (quoting *San Antonio Metropolitan Transit Auth. v. Donovan*, 557 F. Supp. 445, 453 (W.D. Tex. 1983), *rev'd*, 105 S. Ct. 1005 (1985)).

84. See *infra* notes 127-50 and accompanying text.

85. "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." *National League of Cities*, 426 U.S. at 842; see also *id.* at 852 ("Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours . . . [and] sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.'" (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

86. *Garcia*, 105 S. Ct. at 1016.

to define those limitations and, more importantly, held that the remedy for their violation was political, not judicial.⁸⁷

National League of Cities had declared that limits on federal power prohibit regulation interfering with "traditional aspects of state sovereignty."⁸⁸ This led to the "traditional governmental functions" test⁸⁹ that the *Garcia* opinion found so troublesome.⁹⁰ *Garcia* rejected the view that the courts could identify "principled constitutional limitations"⁹¹ on the commerce power by relying on different attributes of state sovereignty. Indeed, according to Justice Blackmun, "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."⁹² It is consequently not for the courts "to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."⁹³

Where does this leave the states' relationship to federal regulatory authority? Even if the Constitution is inconsistent with the notion of state sovereignty, there is no doubt that our federalism is based on the continuance of the states as fully independent and autonomous governments.⁹⁴ State independence and autonomy are inconsistent with their complete subjection to federal regulatory power. The *Garcia* Court does not disagree with this; it expressly recognizes the emphasis of the framers on the need "to ensure the role of the States in the federal system."⁹⁵ But it breaks sharply with prior law by concluding that protecting the states from improper exertions of federal regulatory authority is no longer a judicial function. Instead, "the principal means . . . to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."⁹⁶ That structure "was designed in large part to protect the States from overreaching by Congress."⁹⁷ The states' representation in Congress and their role in the selection of both the executive and legislative branches of the federal government are to be relied on to shield their interests from undue federal invasion.⁹⁸

87. *Id.* at 1020.

88. *National League of Cities*, 426 U.S. at 849.

89. See *Garcia*, 105 S. Ct. at 1016.

90. See *infra* notes 101-26 and accompanying text.

91. *Garcia*, 105 S. Ct. at 1016.

92. *Id.* at 1017.

93. *Id.*

94. "The State governments may be regarded as constituent and essential parts of the federal government." *The Federalist* No. 45, at 288 (J. Madison) (H.C. Lodge ed. 1899). Madison further emphasized that the states held numerous and great powers, "extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* at 290; see also Kaden, *supra* note 22, at 852-53 (states left with enormous discretionary powers).

95. *Garcia*, 105 S. Ct. at 1018.

96. *Id.*

97. *Id.*

98. *Id.* For a general discussion of this view of the states' role in the federal government, see Wechsler, *The Political Safeguards of Federalism: The Role of the States in the*

The Court's ultimate conclusion is that the states must look to the federal political process rather than to enforceable constitutional limitations to protect them against undue congressional encroachment. "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."⁹⁹

Under *Garcia* the scope of Congress' authority over the states under the commerce clause no longer presents any judicial question: "[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."¹⁰⁰

IV. A *GARCIA* CRITIQUE

A. *An Unworkable Test?*

The first reason given in the *Garcia* opinion for overruling *National League of Cities* is that the "traditional governmental functions" test is unworkable.¹⁰¹ However, mere difficulty in applying legal principles has never been considered an adequate reason for abandoning those principles. Holmes' admonition against expecting legal rules to operate with the precision of mathematical formulae¹⁰² is particularly relevant in public law: "[T]he luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution."¹⁰³ The fact that courts have reached seemingly inconsistent results in applying *National League of Cities*¹⁰⁴ is not by itself enough to warrant overruling that case. It is, after all, the job of the Supreme Court to reconcile differences in lower court results. Moreover, it is by no means as clear as the *Garcia* opinion asserts that the federal courts were hopelessly divided in their application of *National League of Cities*. The Court's assertion is based on a list of cases which, in its view, reach inconsistent results.¹⁰⁵ As Justice Powell points out in his dissent, the cases listed by the Court

Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 546-47 (1954); see also Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1560-65 (1977) (states' rights are protected through their representation in Congress and their role in selection of the President); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603, 614 (1975) (actions of Congress reflect the balance between national and state interest). For an exposition of the viewpoint that this traditional role of the states in the federal government has broken down, see Kaden, *supra* note 22, at 860-67.

99. *Garcia*, 105 S. Ct. at 1018.

100. *Id.* at 1020.

101. See *supra* notes 79-83 and accompanying text.

102. See O.W. Holmes, *The Common Law* 1 (1881).

103. *Garcia*, 105 S. Ct. at 1023 n.4 (Powell, J., dissenting).

104. See *infra* notes 105-26 and accompanying text.

105. See *Garcia*, 105 S. Ct. at 1011.

do not, as it claims, demonstrate the impossibility of definition. According to Justice Powell, a number of the cases "simply do not involve the problem of defining governmental functions."¹⁰⁶ Justice Powell cites two cases to support this statement.¹⁰⁷ The first, an Eleventh Circuit case, involved a mental health center operated by a non-profit corporation which, according to the circuit court, was "structured similarly to most private, non-profit institutions."¹⁰⁸ The court properly concluded that the center was "not a state agency or a political subdivision of the state"¹⁰⁹ and hence, under the *Hodel* case, was not within the first prong of the test used in applying *National League of Cities*. The court then stated expressly that this holding made it unnecessary to decide whether the center was performing a function that was "traditional or essential."¹¹⁰

In the second case, the Second Circuit held that New York City had waived its right to assert that enforcement of a transportation control plan under the Clean Air Act¹¹¹ violated the city's tenth amendment rights under *National League of Cities* because the city failed to raise the claim in its petition for review of the Environmental Protection Agency's approval of the plan.¹¹² The substitution of federal regulation for state and local regulation, such as that involved in the plan promulgated under the Clean Air Act, is similar to the *Hodel* situation. A federal regulation displacing local regulation of private activities does not appear to involve the regulation of "States as States."

Justice Powell also cited two other cases, among those listed by the *Garcia* majority, as "not properly analyzed under the principles of *National League of Cities*, notwithstanding some of the language of the lower courts."¹¹³ The cases dealt with the questions of whether a federal

106. *Id.* at 1023 n.4 (Powell, J., dissenting).

107. *Id.*

108. *Williams v. Eastside Mental Health Center*, 669 F.2d 671, 674 (11th Cir.), *cert. denied*, 459 U.S. 976 (1982).

109. *Id.* at 679.

110. *Id.*

111. Ch. 360, 69 Stat. 322 (1955) (current version at 42 U.S.C. §§ 7401-7642 (1982)).

112. *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977). At issue in *Friends of the Earth* was the Clean Air Act, which contained a comprehensive regulatory scheme designed to protect public health. *See id.* at 29. The Act established standards governing acceptable levels of air pollution. *Id.* State and local governments were required to establish air quality programs to meet the federal standards, and submit plans to the Environmental Protection Agency. *Id.* at 29-30. Failure to submit a plan allowed the EPA to design and implement a substitute plan. *Id.* at 30. The actual holding of the court was that the city had waived its rights to assert a tenth amendment claim. *See id.* at 35. To the extent that the court pursued a *National League of Cities* inquiry, it noted that enforcement of the plan would not entail "basic structural changes" in city services and would not result in the kind of invasion into integral governmental functions decried in *National League of Cities*. *See id.* at 38. However, the court mainly focused on the "cooperative" nature of the plan, *see id.* at 37, and on the state's voluntary enactment of the plan, *see id.*, thus exercising "its sovereign powers to make policy choices participated in by its citizens." *Id.* at 38.

113. *Garcia*, 105 S. Ct. at 1023 n.4 (Powell, J., dissenting).

magistrate could suspend a motorist's California driver's license for drunk driving in a federal enclave in the state¹¹⁴ and whether a city monopoly for its solid waste recycling plant violated the Sherman Act.¹¹⁵ In both opinions, there was no need to reach the tenth amendment issue.¹¹⁶ The mere fact that the courts chose to grapple with the question is not enough to bring the cases within the ambit of *National League of Cities*.

Justice Powell's criticisms apply equally to three of the other cases cited by the *Garcia* opinion. They, too, do not involve "the problem of defining governmental functions" and hence do not rest on proper analysis of *National League of Cities*.¹¹⁷ As to the remaining five cases listed in

114. See *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978).

115. See *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982).

116. In *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978), the court examined the question of whether a federal magistrate could order the suspension of the defendant's driver's license as punishment for a drunk driving conviction. The case turned on whether suspension was penal or regulatory and the Ninth Circuit determined that California viewed suspension as regulatory. See *id.* at 1100. Because the Assimilative Crimes Act only allowed a federal court to use a state's penal laws, it could not carry out such a regulatory decision. See *id.* The court, however, then went on to examine the case under the principles of *National League of Cities* and determined that the suspension of the driver's license violated the tenth amendment. See *id.* at 1102-03. This was not a necessary basis for the decision, as the principles of *National League of Cities* should not have been implicated. The action of a federal judge in suspending a driver's license is not equivalent to direct legislation by Congress. Moreover, the judge's act has no impact on allocation of resources by the State of California, a factor the Court pointed to in both *National League of Cities* and *EEOC*. See *EEOC v. Wyoming*, 460 U.S. 226, 240-42 (1983); *National League of Cities v. Usery*, 426 U.S. 833, 846-52 (1976).

In *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), the court was faced with a dispute over a plan by the city of Akron to establish a solid waste recycling plant. The plaintiffs, private waste collectors, challenged the plan on a number of grounds, including a Sherman Act claim. See *id.* at 1195. The court determined that the city's waste disposal program was valid under the state action exemption to the Sherman Act. See *id.* The court then held that the Sherman Act should not apply in any event, stating that given two such competing goals, "Tenth Amendment values should not be narrowly read when Congress has not expressly or by clear implication displaced a traditional exercise of local police power." *Id.* at 1196. As with the *Best* case, it is apparent that a *National League of Cities* analysis was peripheral to the case.

117. See *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334 (9th Cir. 1981) (federal preemption of state regulation of air transportation), *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982) (whether Sherman Act infringes on local regulation of ambulances), *aff'd*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985); *Oklahoma ex rel. Derryberry v. Federal Energy Regulatory Comm'n*, 494 F. Supp. 636 (W.D. Okla. 1980) (federal preemption of natural gas regulation), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

In *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982), *aff'd*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985), Kansas City adopted an ambulance service ordinance which provided that only one company would supply ambulance services for the city. *Id.* at 964-65. The court decided that this policy was valid under the state action exemption to the antitrust laws. See *id.* at 967. As with the *Hybud Equipment* case, the court then unnecessarily went on to decide the *National League of Cities* issue.

Hughes Air Corp. v. Public Utils. Comm'n, 644 F.2d 1334 (9th Cir. 1981) and

Garcia, they are not nearly as idiosyncratic as the majority opinion asserts. They do divide on whether the particular functions at issue are traditional state functions under the *National League of Cities* test. But those that hold that the functions involved are not entitled to *National League of Cities* immunity¹¹⁸ appear consistent with the pre-*Garcia* Supreme Court decisions, particularly the *Long Island Rail Road* case. The same appears true of the decision holding that the Puerto Rico Highway Authority is protected under *National League of Cities*, since roads have traditionally been built and maintained by governments.¹¹⁹ Closer to the line is the Sixth Circuit case reaching the same result for operation of a municipal airport;¹²⁰ but it, too, deals with a function that has long been assumed by government.¹²¹

After listing the cases, the *Garcia* opinion states that it is all but impossible to find an organizing principle justifying the inconsistent decisions reached: "The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best."¹²² Yet, as already shown, the cases involving drivers' licenses,¹²³ traffic regulation,¹²⁴ and operation of mental health centers¹²⁵ did not involve federal regulation of "the States as States" at all. And the case concerning the Puerto Rico Highway Authority¹²⁶ may, as seen, be supported as a proper appli-

Oklahoma *ex rel.* Derryberry v. Federal Energy Regulatory Comm'n, 494 F. Supp. 636 (W.D. Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) both involved situations in which the federal government had complete preemption power in the area in question. Even though a *National League of Cities* analysis was not necessary, the *Derryberry* court appeared to draw a proper line, explaining that the power to regulate the production and sale of gas is not a traditional state function. *See* 494 F. Supp. at 657. "It is not the states' roles as providers of roads, education, and similar traditional state functions which is [sic] infringed by the Act, but, if anything, their choice of methods by which to fund such functions." *Id.*

118. *See* Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) (domestic services for aged and handicapped); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694 (1st Cir. 1977) (operation of telephone company); Woods v. Homes & Structures, 489 F. Supp. 1270 (D. Kan. 1980) (issuance of industrial development bonds that benefit private companies which had previously issued them).

119. *See* Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841 (1st Cir. 1982). The court, using a semi-historical approach, stated that "governments have built and maintained roads from time immemorial," *id.* at 845, and pointed out that road building is undertaken for the public welfare, not as a profit-making activity. *See id.*

120. *See* Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979).

121. As a factual matter, the court declared that airports are almost always operated by public entities and noted that only two airports in the country were operated by private concerns. *See id.* at 1038 & n.7.

122. 105 S. Ct. at 1011.

123. *See* United States v. Best, 573 F.2d 1095 (9th Cir. 1978).

124. *See* Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977). The plan for controlling air pollution involved the regulation of traffic. *Id.* at 32 & n.6.

125. *See* Williams v. Eastside Mental Health Center, 669 F.2d 671, 674 (11th Cir.), *cert. denied*, 459 U.S. 976 (1982).

126. *See* Molina-Estrada v. Puerto Rico Highway Auth. 680 F.2d 841 (1st Cir. 1982).

cation of the *National League of Cities* test.

B. *Abnegation or Abdication?*

The most far-reaching aspect of *Garcia* was its declaration of a hands-off posture in cases involving claims of federal regulatory infringement on the states. The announced policy of judicial abnegation stands in striking contrast to the Court's traditional role as arbiter of the federal system. Over the years it has ultimately been the Court that has kept the balance between federal and state power¹²⁷ and it has done so regardless of which level of government—state or federal—was performing the claimed infringement.

Few today would disagree with the need for judicial review of state action to ensure against violation of the national interests preserved by the Constitution. Yet, not too long ago, the propriety of the judicial role in protecting commerce against state infringements was questioned by Justice Black. The commerce clause "means that Congress can regulate commerce and that the courts cannot. . . . I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress."¹²⁸ In Justice Black's view, judicial condemnation of a state law on the ground of repugnancy to the commerce clause is itself a regulation of commerce and such regulation was given to Congress, not the courts.¹²⁹

The Black position was based on the proposition that a judicial tribunal is not qualified to make the economic judgments on which cases involving alleged state transgressions of the commerce clause must be based. Congress alone, Justice Black once stated, can not only consider whether particular state legislation "is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union."¹³⁰

As a practical matter, it is doubtful whether Congress could deal effectively with the myriad of problems of state impediments to national trade. Even if such an assembly could acquire the broad view and impartiality necessary to resolve these matters, it is hard to see how it would find the time, when it is now swamped by the pressures of its normal legislative tasks. And where is the legislative department to acquire the machinery and the personnel necessary to oversee such a program, in order to deal speedily and effectively with cases of improper state action as they arise?

127. See *infra* notes 130-50 and accompanying text.

128. *Morgan v. Virginia*, 328 U.S. 373, 386-87 (1946) (Black, J., concurring).

129. See *id.* (Black, J., concurring); T. Powell, *Vagaries and Varieties in Constitutional Interpretation* 160 (1967).

130. *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 189 (1940) (Black, J., dissenting).

Only the judicial process can deal effectively with these cases so as to give immediate practical effect to the policy behind the commerce clause. Justice Douglas aptly pointed this out some years ago. Speaking of state barriers to commerce, he said: "Congress, of course, could have removed those barriers and probably would have done so. But the judiciary has moved with speed. As a result of the case by case approach, there has been no great lag between the creation of the forbidden barrier or burden and its removal by the judiciary."¹³¹

Certainly, it has been the American experience that fulfillment of a policy such as that of the commerce clause must depend primarily on the courts. In Justice Douglas' phrase, "Constitutions can say that commerce must be free; but over the years the courts will be largely the ones who will implement these provisions."¹³² The Supreme Court remains the indispensable instrument for carrying out the negative aspect of the commerce clause. As the Court itself expressed it, in a leading case specifically rejecting Justice Black's view: "[I]n such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."¹³³

The same can essentially be said about enforcing constitutional protections for the states against federal encroachments. The *Garcia* opinion recognizes "that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."¹³⁴ But *Garcia* holds that it is not for the Court to define the affirmative limits imposed on federal activity under the commerce clause.¹³⁵ Instead it is for Congress alone to define and enforce "the limits on Congress' authority to regulate the States under the Commerce Clause."¹³⁶

Such an approach, like that of Justice Black to state power over commerce, flouts the basic principles of our constitutional law. Those principles rest on the fundamental proposition that it is for "the federal judiciary 'to say what the law is' with respect to the constitutionality of acts of Congress."¹³⁷ Provided that the tests of justiciability are met¹³⁸ and that a political question is not presented¹³⁹ (and both conditions were met in *Garcia*), it is for the courts "to say what the law is" on all constitutional issues presented to them.

All political history shows us that a constitution is only a paper instru-

131. W. Douglas, *We the Judges* 254 (1956).

132. *Id.* at 255.

133. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

134. 105 S. Ct. at 1020.

135. *See id.*

136. *Id.* at 1016.

137. *Id.* at 1027 (Powell, J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

138. *See infra* notes 185-87 and accompanying text.

139. *See infra* note 188 and accompanying text.

ment if it cannot be enforced by the courts. Addressing the court in the *Five Knights' Case* (one of the great State Trials of Stuart England), the Attorney General, arguing for the Crown, asked, "[S]hall any say, The king cannot do this? No, we may only say, He will not do this."¹⁴⁰ It was precisely to ensure that, in our system, we would be able to say, "The Government *cannot* do this" that the people enacted a written constitution containing basic limits on the powers of government. Of what avail would such limits be, however, if there were no *legal* machinery to enforce them?

Without such machinery, our system would prove no more effective than that set up under the Articles of Confederation. "Government itself would be useless," as the first United States Attorney General said, "if a pleasure to obey or transgress with impunity, should be substituted in the place of a sanction to its laws. This was a just cause of complaint against the deceased confederation."¹⁴¹

To avoid the weaknesses which had rendered the Confederation futile, the Constitution must incorporate "a coercive principle"¹⁴²—the only question, one of the framers declared, was whether it should be "a coercion of law, or a coercion of arms."¹⁴³ The provision of effective "coercion of law" for enforcement of the Constitution has been the uniquely American contribution to the science of government. "Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles . . . are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our constitution."¹⁴⁴ For the ineffectiveness of other constitutions whose violations could be censured only by force, we have substituted the institution of judicial review.

Nor is it consistent with reality to urge, as is too often done, that the true meaning of the Constitution is to have each branch as the final interpreter of its own constitutional powers.¹⁴⁵ Even the best of men can hardly be trusted to act impartially as arbiters of their own authority.

140. Darnel's Case, [1627], reprinted in 3 A Complete Collection of State Trials 1, 45 (T. Howell ed. 1816). This case is traditionally known as the *Five Knights' Case*.

141. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 422 (1793) (argument of Attorney General Randolph).

142. 3 The Records of the Federal Convention of 1787 at 241 (M. Farrand ed. 1937) (remarks of Oliver Ellsworth).

143. *Id.*

144. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 363 (1816) (Johnson, J., concurring).

145. This view was espoused by President Andrew Jackson, among others:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.

2 Messages and Papers of the Presidents 1789-1897 at 582 (J. Richardson ed. 1896) (Veto Message to the Senate of Andrew Jackson). See R. Jackson, *The Struggle for Judicial*

We need not necessarily agree with Lord Acton that great men are almost always bad men;¹⁴⁶ but our constitutional law should clearly be based on such an assumption. Indeed, the whole organic structure has been erected on the assumption that the king not only is capable of doing wrong but is more likely to do wrong than other men if he is given the opportunity.

Garcia's judicial abnegation ignores the dangers involved in entrusting the political branches with the last word on the legality of their acts. "More troubling than the logical infirmities in the Court's reasoning is the result of its holding, i.e., that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system."¹⁴⁷

Over a century and a half ago, Justice Story summed up this situation: "The universal sense of America has decided, that in the last resort the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments, so far as they are capable of being made the subject of judicial controversy."¹⁴⁸ From the beginning, this has been particularly true when federal and state power conflict.¹⁴⁹ Judicial review has, indeed, always been the sine qua non of the federal structure. "So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."¹⁵⁰

C. *Beyond the Commerce Clause?*

At issue in *Garcia* was a federal statute enacted under the commerce clause. The implications of *Garcia* nevertheless go beyond infringements on the states by laws enacted under the commerce power. The *Garcia* opinion goes out of its way to speak disparagingly of the case law in the area of intergovernmental tax immunities: "A further cautionary note is sounded, however, by the Court's experience in the related field of state immunity from federal taxation."¹⁵¹

According to *Garcia*, the cases involving state immunity from federal

Supremacy 9-10 (1941) [hereinafter cited as Jackson II], for a discussion of the idea that an arbiter between the national government and the states is a necessity.

146. J. Acton, *Acton-Creighton Correspondence*, in *Essays on Freedom and Power* 335-36 (1972) (letter to Mandell Creighton dated April 15, 1887).

147. *Garcia*, 105 S. Ct. at 1026 (Powell, J., dissenting) (emphasis in original).

148. See 3 J. Story, *Commentaries on the Constitution of the United States* § 1570, at 429-31 (1833).

149. See Jackson II, *supra* note 145, at 17-22 (Supreme Court arbiter of conflicts between states and national government).

150. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 521 (1859). See also *South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("To preserve the even balance between [state and federal] governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this.").

151. 105 S. Ct. at 1012.

taxation never developed "a consistent formulation of the kinds of [state] functions that were entitled to immunity."¹⁵² The case law on the matter was, however, not nearly as confused as *Garcia* indicates. On the contrary, the decisions during this century have followed a relatively consistent pattern in determining whether tax immunity should be granted.

The starting point of the law of intergovernmental tax immunities is *McCulloch v. Maryland*.¹⁵³ The wholesale federal immunity recognized there also had implications for state immunity. Under *Collector v. Day*,¹⁵⁴ it was assumed that there was a reciprocal immunity in the states, which fully protected the states from federal taxation. *Collector v. Day* was, of course, overruled¹⁵⁵ and its theory that a tax on income was a tax on its governmental source relegated to the constitutional dustbin. The areas of private tax immunity erected under that theory have been completely eliminated.¹⁵⁶ But that has not meant the subjection of the states to unrestricted federal taxing power. The *Collector v. Day* assumption of equivalent state and federal immunity now appears unwarranted. Yet the cases until now have recognized that there is still some state immunity—based not on a categorical constitutional command like the supremacy clause but "judicially implied from the States' role in the constitutional scheme."¹⁵⁷

In *Massachusetts v. United States*,¹⁵⁸ the most recent pre-*Garcia* case on the subject, the Court indicated that, for purposes of state tax immunity, there is a line between a "taxing measure . . . to preclude the States from performing essential functions"¹⁵⁹ and one that "may tax revenue-generating activities of the States that are of the same nature as those traditionally engaged in by private persons."¹⁶⁰

152. *Id.*

153. 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, Chief Justice Marshall laid down a broad principle of immunity for federal agencies from state taxation. *See id.* at 435-37. For a recent discussion, see *United States v. County of Fresno*, 429 U.S. 452, 459-62 (1977).

154. 78 U.S. (11 Wall.) 113 (1871).

155. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) ("*Collector v. Day* [and other cases] are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities."). *See also* 1 N. Redlich & B. Schwartz, *Constitutional Law* § 2.04, at 2-62 to -63 (1983) (*Collector v. Day* assumption of equivalence in intergovernmental tax immunities unwarranted).

156. *See Jackson II, supra* note 145, at 243-44 (Court disposed of doctrine of intergovernmental tax immunity insofar as it protected public officials from taxation).

157. *Massachusetts v. United States*, 435 U.S. 444, 455 (1978).

158. 435 U.S. 444 (1978).

159. *Id.* at 458.

160. *Id.* at 457. Although leaving the traditional line untouched, the Court used language stressing the importance of the federal interest. After noting that cases had increasingly come to limit states' immunity from federal taxation, *see id.* at 458-59, the Court indicated that unless a revenue measure interferes with traditional state activities, it will be upheld. "Where the subject of tax is a natural and traditional source of federal revenue and where it is inconceivable that such a revenue measure could ever operate to preclude traditional state activities, the tax is valid." *Id.* at 459-60. In addition, in a

On one side of the line is a tax on state property used to perform a so-called "essential" state function:

[W]e could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed.¹⁶¹

As Justice Frankfurter explained it, "Only a State can own a Statehouse [It] could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State."¹⁶²

On the other side of the line is a tax on mineral water bottled and sold by a state¹⁶³ or a tax on a state-run liquor business.¹⁶⁴ Such a tax is valid because, by such a tax, "Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State [and] the Constitution of the United States does not forbid it merely because its incidence falls also on a State."¹⁶⁵

It is true that the Court has at times unduly stressed semantics in deciding tax immunity cases, stating that the line in these cases was that between "governmental" and "proprietary"¹⁶⁶ functions and later asserting that the distinction between "governmental" and "proprietary" functions was "untenable."¹⁶⁷ In practice, nevertheless, the line stated in *Massachusetts v. United States*¹⁶⁸ has proved workable; under it, state immunity does not extend to activities not essential for the preservation of state government. "The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character."¹⁶⁹ *Massachusetts v. United States*,¹⁷⁰ though recognizing federal power to impose user fees that require states to pay their fair share of the cost of federal programs from

harbinger of the *Garcia* decision, the Court focused on the makeup of Congress as one reason for limiting the immunity. "The Congress, composed as it is of members chosen by state constituencies, constitutes an inherent check against the possibility of abusive taxing of the States by the National Government." *Id.* at 456.

161. *New York v. United States*, 326 U.S. 572, 587-88 (1946) (Stone, C.J., concurring).

162. *Id.* at 582.

163. *See New York v. United States*, 326 U.S. 572 (1946).

164. *See South Carolina v. United States*, 199 U.S. 437 (1905).

165. *New York v. United States*, 326 U.S. 572, 582 (1946).

166. *See Garcia*, 105 S. Ct. at 1013.

167. *New York v. United States*, 326 U.S. 572, 583 (1946). The Court used the governmental/proprietary or private business distinction on several occasions. *See, e.g., Allen v. Regents*, 304 U.S. 439, 443, 452 (1938) (Georgia's revenues from admission charges to athletic events are not immune from federal taxation); *South Carolina v. United States*, 199 U.S. 437, 463 (1905) (liquor business not a governmental function).

168. 435 U.S. 444 (1978).

169. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 172 (1911).

170. 435 U.S. 444 (1978).

which they benefit,¹⁷¹ left the line of state immunity from other taxes untouched.

Now *Garcia* casts doubt on all the state tax immunity cases because it asserts that the tax cases, like those involving regulatory immunity, have been based on an "unworkable" distinction.¹⁷² Here too, state immunity as a judicially enforceable doctrine must be abandoned. The implication is that there is no longer any state immunity from federal action. A federal tax on an essential state function—even a property tax on the State capitol—is not subject to constitutional attack. The states must depend on the political process to protect them from federal levies—even those taxing "the State as a State."¹⁷³

D. *Discrimination as a Limit*

The statute involved in both *National League of Cities* and *Garcia* was the Fair Labor Standards Act.¹⁷⁴ As originally enacted, its wage and hour requirements were binding only on private employers.¹⁷⁵ The 1974 amendments at issue in both cases extended those requirements to the states as employers.¹⁷⁶ What would have happened, however, if Congress had imposed the wage and hour requirements only on the states as employers?

From the language alone of Justice Blackmun's *Garcia* opinion, it would appear that this type of federal infringement on the states is beyond judicial control. Nevertheless, it is doubtful that the Court would maintain its hands-off posture in the face of a discriminatory law that applies its regulatory prescriptions only to the states—and without considering what state functions are affected by the law.

In *New York v. United States*,¹⁷⁷ the Court upheld a federal tax on mineral waters bottled and sold by a state.¹⁷⁸ Though the Court split sharply on the constitutional approach to the tax which the state had to pay,¹⁷⁹ all the majority Justices stressed that the tax was one which ap-

171. *Id.* at 461-62.

172. *Garcia*, 105 S. Ct. at 1014.

173. *New York v. United States*, 326 U.S. 572, 582 (1946).

174. The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982)), amended by Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 1985 U.S. Code Cong. & Ad. News (99 Stat.) 787).

175. The original Act specifically excluded the states and their subdivisions from its coverage:

'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State . . .

The Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060, 1060 (emphasis added).

176. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified at 29 U.S.C. §§ 201-219 (1982)). See *supra* notes 7-9 and accompanying text.

177. 326 U.S. 572 (1946).

178. See *id.* at 574-75.

179. Justice Frankfurter, writing for the Court, in an opinion joined by Justice Rut-

plied equally to all mineral water sales and that they would have reached a different result had the tax been imposed only on states engaged in the mineral water business and not on private persons so engaged. "Concededly," wrote Chief Justice Stone, "a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government."¹⁸⁰ This means, Justice Rutledge explained, "that state functions may not be singled out for taxation when others performing them are not taxed or for special burdens when they are."¹⁸¹

It is difficult to believe that even the *Garcia* majority would have upheld the law if it had imposed its wage and hour requirements only on the states and not on private employers as well. Despite *Garcia* then, discrimination should remain an enforceable limitation on congressional power to impose commerce clause regulations or taxes on the states. If Congress ever singles out state functions for regulation or taxation, the Court should follow the view expressed in *New York v. United States* and intervene, notwithstanding anything to the contrary in *Garcia*. *Garcia* itself stressed that the state "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."¹⁸² A federal law imposing obligations only on state employers would present an entirely different case.

CONCLUSION

In his *Garcia* dissent, Justice Powell asserted that the Court's holding was contrary to the doctrine of judicial review established by *Marbury v. Madison*:¹⁸³ "In rejecting the role of the judiciary in protecting the States from federal overreaching, the Court's opinion offers no explanation for ignoring the teaching of the most famous case in our history."¹⁸⁴

ledge, was concerned with the possibility of imposing taxes discriminating against the states, and stated that "so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." *Id.* at 582.

Chief Justice Stone, in a concurring opinion joined in by Justices Reed, Murphy and Burton, pointed out that a federal tax, which is not discriminatory as to a particular subject matter, might affect a state in a way that would "interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587. He posited that a non-discriminatory tax on real estate could be applied to the State's capitol, statehouse or public schools and in such an instance, an additional layer of analysis would be necessary. The Court would be required to examine "whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government." *Id.* at 588. If it does interfere, the tax's non-discriminatory nature will not save it. *Id.*

180. *Id.* at 586 (Stone, C.J., concurring).

181. *Id.* at 584-85 (Rutledge, J., concurring). See also *id.* at 581 (Frankfurter's view that the States may only be taxed in the absence of discrimination).

182. 105 S. Ct. at 1020.

183. 5 U.S. (1 Cranch) 137 (1803).

184. *Garcia*, 105 S. Ct. at 1027 (Powell, J., dissenting).

All the accepted requirements for justiciability were met in *Garcia*. There was plainly a "case" or "controversy" in the Article III sense;¹⁸⁵ the plaintiffs had standing;¹⁸⁶ the requirement of ripeness was met;¹⁸⁷ and the case did not present a political question¹⁸⁸—at least not in the usual meaning of the term. Despite this, the Court held that the judiciary could not decide whether a federal law violated "the limits on Congress' authority to regulate the States under the Commerce Clause."¹⁸⁹ *Garcia* did not deny that there are constitutional limits on the commerce clause; it only denied the judicial role in determining those limits.

Such a holding is so "inconsistent with the fundamental principles of our constitutional system"¹⁹⁰ that more than a "modest doubt"¹⁹¹ may be expressed on both its correctness and durability. The correctness of the holding has already been questioned in this Article.¹⁹² The sine qua non of our constitutional system is its rejection of the doctrine that "political officials . . . are the sole judges of the limits of their own power."¹⁹³ Yet that is exactly the result under *Garcia* in cases involving claimed infringements by federal action on the states. Instead of judicial review, the states are left only with the "safeguard" of Congressional self-restraint.

185. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court defined the term "case or controversy:"

In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

Id. at 95.

186. The most frequently used definition of standing is found in *Baker v. Carr*, 369 U.S. 186 (1962):

Have the [parties] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

Id. at 204. Standing can be demonstrated, among other ways, by a showing of injury in fact, see *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970), some form of personal interest, see *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976), or even the possibility of noneconomic harm, see *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

187. See *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present.") (quoting *Reserve Army v. Municipal Ct.*, 331 U.S. 549, 574 (1947)); *Poe v. Ullman*, 367 U.S. 497, 502-08 (1961) (Court will not decide cases where there is no immediacy).

188. See B. Schwartz, *supra* note 19, at 153-57.

189. *Garcia*, 105 S. Ct. at 1016.

190. *Id.* at 1026 (Powell, J., dissenting).

191. William Shakespeare, *The History of Troilus and Cressida*, Act II, scene 2, line 15.

192. See *supra* notes 127-50 and accompanying text.

193. *Garcia*, 105 S. Ct. at 1026 (Powell, J., dissenting).

According to *Garcia*, however, that safeguard is made effective by the states' role in the selection of the federal political branches. The "structure of the Federal Government itself" is thus "relied on to insulate the interests of the States."¹⁹⁴ But that subjects constitutional protections to the inconstancies of the ever-changing political climate—the very thing that judicial review was intended to avoid. *Garcia* points to the increasing ability of the states to secure federal grants, particularly for mass-transit systems,¹⁹⁵ as demonstrating the "effectiveness of the federal political process in preserving the States' interests."¹⁹⁶ As this is being written, however, the proposed federal budget provides for drastically reduced federal aid to the states, including the elimination of revenue sharing and cuts in transit subsidies.¹⁹⁷ "Trust the Congress!" is hardly enough to protect the states from federal legislators who look on them with a more hostile eye than the *Garcia* opinion anticipated.

A more important question is that of durability of the *Garcia* decision. Three of the dissenting Justices¹⁹⁸ asserted their belief that *Garcia* would be of short duration and that, in Justice Rehnquist's words, "[the *National League of Cities*] principle . . . will, I am confident, in time again command the support of a majority of this Court."¹⁹⁹ Whether Rehnquist's prophecy becomes reality will depend, in large part, on the future composition of the Supreme Court. If President Reagan replaces one or more Justices of the *Garcia* majority, the *Garcia* life-span may prove even shorter than that of *National League of Cities*.

Yet, even if the scenario of Reagan-appointed Justices does not materialize, it is doubtful that the *Garcia* rejection of review power over congressional infringements on the states will be followed by future Courts. Despite *Garcia*, the doctrine of no-review will give way when a federal law singles out the states for regulation or taxation. Leaving matters to the political process will not suffice where Congress uses its powers to discriminate against the states.²⁰⁰

In other cases involving federal laws imposing constraints on the states, it may also be questioned whether the *Garcia* rebuff to judicial review will set the future constitutional theme. Constitutional limitations without judicial enforcement are but empty words. "What is [a]

194. *Id.* at 1018.

195. *See id.* at 1019-20.

196. *Id.* at 1018.

197. Federal aid as a percentage of state-local revenue has declined substantially under the Reagan administration. In 1980, federal aid equaled 31.7 percent of state-local revenue; by 1984, this figure had fallen to 23.7 percent. *See* N.Y. Times, May 13, 1985, at A14, col. 5 (excerpted from study published by Advisory Commission on Intergovernmental Relations, an independent governmental agency).

198. In an opinion in which Justices Powell and Rehnquist joined, Justice O'Connor indicated her view that "this Court will in time again assume its constitutional responsibility." *Garcia*, 105 S. Ct. at 1038 (O'Connor, J., dissenting). In his dissent, Justice Rehnquist also espoused this view. *See id.* at 1033 (Rehnquist, J., dissenting).

199. *Id.* at 1033 (Rehnquist, J., dissenting).

200. *See supra* notes 174-82 and accompanying text.

right?" asked Justice Story in an early case. "That which may be enforced in a Court of Justice."²⁰¹ That is even more true of constitutional rights than of other rights. If, as the *Garcia* opinion recognizes, there are limits on federal action affecting the states,²⁰² those limits are meaningless if they cannot be enforced by the courts.

This does not necessarily mean that *National League of Cities* will be restored to pre-*Garcia* status. The Court may reclaim its review power in certain cases but still uphold federal regulation in cases such as *National League of Cities* and *Garcia*. It can do this by following the posture of extreme deference toward exercises of the commerce power prevailing between the *Jones & Laughlin*²⁰³ and *National League of Cities* cases. This approach would subject federal statutes imposing regulations on the states to judicial review. But virtually all would be upheld under the deferential approach toward the commerce power displayed by the Court since *Jones & Laughlin*.²⁰⁴ Judicial deference would uphold challenged action under the commerce clause regardless of whether the states, as well as private persons engaged in the same activities, are being regulated. This would bring us back to the law as stated by the Court in 1936: "But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."²⁰⁵

The difficulty with such an approach is that, much as *Garcia* itself, it infringes unduly on the state autonomy so essential to the workings of our federalism. A more moderate approach, giving greater weight to the values inherent in federalism and yet not fully reinstating *National League of Cities*, is to return to the law as it stood under *Maryland v. Wirtz*²⁰⁶—the case that *National League of Cities* overruled.

Maryland v. Wirtz upheld an amendment to the Fair Labor Standards Act²⁰⁷ imposing its wage and hour requirements on employees of state-operated schools and hospitals.²⁰⁸ The decision was based on the following principle stated by the Court: "If a State is engaging in economic

201. *Comegys & Pettit v. Vasse*, 26 U.S. (1 Pet.) 193, 216 (1828).

202. 105 S. Ct. at 1020.

203. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

204. The Court used a rational basis test to determine whether Congress had a sufficient justification for finding that a particular regulatory scheme was necessary to protect interstate commerce. See *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). For a discussion of cases in which the Court held that Congress had demonstrated this rational basis, see *supra* notes 24-27 and accompanying text.

205. *United States v. California*, 297 U.S. 175, 185 (1936).

206. 392 U.S. 183 (1968).

207. *Id.* at 194-95.

208. In 1966, Congress added to the list of enterprises covered by the Act those . . . engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education.

activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."²⁰⁹ The distinction is between functions which only a state as a government can perform and those which can also be performed by private persons.

This distinction is also fundamental in tax immunity cases.²¹⁰ It might easily have been used by the Court in *National League of Cities* to distinguish that case from *Maryland v. Wirtz*. As the *National League of Cities* opinion recognized, "[T]here are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here."²¹¹ The Court did not, however, base its decision on these "obvious differences." Instead, it overruled *Wirtz*,²¹² refusing to distinguish between federal regulations governing state and local agencies such as police and fire departments and regulations, such as those in *Wirtz*, implicating only schools and hospitals.

If the Court returns to *Wirtz*, the test will be whether the state is performing a function which only a government performs. This test is similar to that used in tax cases and would immunize core state functions from federal regulation or taxation, thus preserving the essentials of state autonomy while not going to the *National League of Cities* extreme.

At present, so soon after *Garcia*, it is nearly impossible to predict which approach will eventually be followed by the Court. Indeed, it is risky to even attempt to prophesy in this area. Few authors are as rash as those who venture into print with attempts to forecast coming constitutional developments. As a newspaper once described my own effort to predict future Supreme Court tendencies, "He would be on much safer ground trying to forecast the winner of the 1958 Kentucky Derby, for which nominations have not even been made as yet."²¹³

All that can be said with any confidence is that the *Garcia* abdication of review power will ultimately be repudiated. A constitutional house divided against itself also cannot stand. Judicial review is so basic to our system that it must again take its place in cases involving federal infringements on the states, as it does in other cases. In these cases, as in others in which constitutionality is at issue, one may share the *Garcia* dissenters' belief "that this Court will in time again assume its constitutional responsibility"²¹⁴—"to say what the law is."²¹⁵

29 U.S.C. § 203(s)(5) (1982).

At the same time, Congress amended the definition of "employer" by removing the exemption of States and their political subdivisions with respect to employees of hospitals, institutions and schools. See *id.* § 203(d).

209. 392 U.S. 183, 197 (1968).

210. See *supra* notes 151-71 and accompanying text.

211. 426 U.S. at 855.

212. See *id.*

213. *The Court Confuses A Noted Professor*, Shreveport Times, July 13, 1957, at Four-A, col. 2. (editorial).

214. *Garcia*, 105 S. Ct. at 1038 (O'Connor, J., dissenting).

215. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).